IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 448 OF 2000

Bapu Shrirang Kajale ..Appellant

versus

Vilas Narayan Dhamal & Anr. ..Respondents

Mr. A. A. Kumbhakoni for the Appellant.

Mr. P. B. Shah for the Respondents.

CORAM : D. G. DESHPANDE,J.

DATE : 17TH FEBRUARY,2005

ORAL ORDER :

1. Heard counsel for the Appellant - original plaintiffs and the Respondents - Original Defendants - Original vendor and the subsequent purchaser.

2. Defendant no.1 entered into an agreement for sale with the plaintiff vide Agreement dated 14.10.1996 Exhibit 39. In respect of the said property the price agreed between the parties in the said agreement was Rs.60,000/- and on that date of the agreement the plaintiff paid Rs.50,000/- towards part of the consideration. Within 8 days i.e. on 22.10.1996 the defendant No. 1 passed a possession receipt in favour of the plaintiff, copy of which

was tendered to me, by the counsel for the appellant, wherein it is clearly mentioned that on that date the defendant No.1 handed over possession of the suit property to the plaintiff. However, it appears that on the same day behind the back of the plaintiff and without knowledge and notice to the plaintiff the defendant No.1 stealthily and secretly sold the same property on the same day to the defendant No.2 for Rs.60,000/- only. Thereafter the plaintiff gave notice calling upon the defendant No.1 to execute the sale deed. Defendants refused and therefore the plaintiff filed a suit for specific performance. The suit came to be dismissed by the court on the ground that the plaintiff has failed to prove his readiness and willingness to perform his part of the contract. It is this order i.e. challenged by the present appellant by this appeal.

3. Counsel for the respondents vehemently opposed this appeal on the ground that the agreement between the parties was for executing the sale deed for Rs.2,55,000/- because in the possession receipt dated 22.10.1996 itself it was written that the price would be Rs.2,55,000/- and the plaintiff was to pay remaining Rs.2,05,000/- at the time of sale deed. He contended that the plaintiff was never willing to pay remaining amount of Rs.2,05,000/-.

He contended that the original suit was filed for specific performance of the agreement for Rs.60,000/-. Two years thereafter the plaintiff amended the plaint and showed his willingness to purchase the property for Rs.2,55,000/- by paying remaining amount. Therefore, according to the counsel for respondents the appellant - plaintiff was never willing to perform his part of the agreement. The notice given by him was in respect of transaction for Rs.60,000/- and therefore these circumstances were sufficient to conclude, as has been rightly done by the trial court that the plaintiff was not ready and willing to perform his part of the contract and therefore, according to him the suit was rightly dismissed.

4. I do not find any substance in any of the submissions made by the counsel for the respondents. There is no question of the plaintiff proving readiness and willingness in this particular case though that may be generally there in all other cases under the Specific Relief Act, therefore claim for specific performance of agreement is made because when on 22.10.1996 the defendant No.1 executed a possession receipt in favour of the plaintiff and handed over possession, then the plaintiff became a party in possession of the property in part performance of contract and he was

therefore expected to defend his title only and it was not at all necessary for him to file a suit for specific performance. Secondly, when after execution of the possession receipt on the same day the defendant No.1 secretly sold the property to defendant No.2, then nothing remained for the plaintiff to show his readiness and willingness because in any case the defendant No.1 would not have been in a position to sale the property to the plaintiff because he has already passed on his title in favour of the original defendant No.2 by Registered Sale Deed dated 22.10.1996. As per the original agreement between the plaintiff and defendant No.1 dated 14.10.1996, the sale deed was to be executed after obtaining the permission from the Authorities but because of this intervening development, the plaintiff was required to file a suit on 28.11.1996 itself within one month or so of the agreement. He amended the plaint and claimed specific performance showing his willingness to pay the amount of consideration if it was held to be of Rs.2,55,000/-. In his examination in chief defendant No.1 has stated that he had asked the plaintiff to complete the transaction and pay him Rs.2,05,000/- and the plaintiff had agreed for making payment of Rs.2,05,000/- as per his convenience but according to the defendant No.1 the plaintiff was not ready and willing to pay the

amount immediately. He has stated that he was in a hurry to sell the land as he was in need of money. From the aforesaid evidence of the defendant No.1 it will be clear that if the price was Rs.2,55,000/- the plaintiff was ready to pay Rs.2,05,000/-. There is no reference to any urgent need of the defendant No.1 to sell the land. Original agreement does not make the time essence of the contract. It has not fixed any specific time but the sale deed was to be executed after obtaining necessary permission, and admittedly and obviously the permission could not have been obtained from Authorities within 8 to 10 days. When the defendant No.1 sold the property on 22.10.1996, there was no permission in his possession.

5. Further Agreement between the plaintiff and the Defendant No.1 dated 14.10.1996 Exhibit 39 is a registered Agreement. It therefore constitutes notice to all, and the subsequent purchaser - defendant No.2 cannot therefore plead that he was not aware of this agreement. He is purchaser with notice and therefore he is bound by this agreement.

6. This is therefore a clear case where the defendant No.1 has practised fraud upon the plaintiff, firstly, by giving possession receipt on 22.10.1996 he handed over possession to the

plaintiff and on the same day he executed the sale deed in favour of the defendant no.2 that too for Rs.60,000/- only. Despite that in the Taba Pavti or possession receipt both the parties have stated that price would be Rs.2,55,000/-,. It is only this stipulation in the possession receipt that will bind the plaintiff to pay the remaining amount of Rs.2,05,000/- otherwise the sale deed executed by defendant No.1 on the same day is for Rs.60,000/-. The trial court did not at all took into consideration this important aspect of the matter and totally failed to appreciate factual inability of defendant no.1 to execute any sale deed in favour of the plaintiff because of his sale deed in favour of defendant No.2 on the same day i.e. 22.10.1996. The judgment therefore being perverse is to be set aside.

7. In the result, I pass the following order:

ORDER

. Appeal is allowed.

. Judgment and decree of dismissal of the suit is set aside. The suit is decreed as prayed. Plaintiff will also be entitled to costs throughout from the defendants.

17.02.2005 (D. G. DESHPANDE, J.)